ECJ, Opinion 1/08, 30 Nov. 2009, nyr

Adam, Stanislas; Lavranos, Nikolaos

Published in:
C.M.L. Rev.

Publication date:
2010

Document Version
Publisher's PDF, also known as Version of record

Common Market Law Review 47: 1523–1539, 2010.

Opinion 1/08 of the Court (Grand Chamber), *Schedules of specific commitments – Conclusion of agreements on the grant of compensation for modification and withdrawal of certain commitments following the accession of new Member States to the European Union*, 30 November 2009, not yet reported.

1. Introduction

Opinion 1/08 of the Court of Justice of the European Union, rendered in accordance with Article 300(6) EC (now 218(11) TFEU), focuses on the division of competences between the Community (as it then was) and its Member States in the field of the common commercial policy (CCP) following the reforms of the Amsterdam and Nice Treaties.[1] The Court elaborated on the complex and somehow obscure interaction between the various paragraphs of former Article 133 EC (now 207 TFEU).[2]

These proceedings for an Opinion find their origin in a conflict between the European Commission, on the one hand, and the Council and a majority of the Member States, on the other, regarding the vertical distribution of external competence for the conclusion of "horizontal agreements" within the ambit of the World Trade Organization (WTO). The heart of the dispute concerned the exclusive nature of the competence of the Community to conclude international agreements granting some compensation to third countries originating in the modification and withdrawal of certain specific commitments within the framework of the General Agreement on Trade in Services (GATS) following the accession of new Member States to the EU.

Beyond its technicalities, this Opinion is illustrative of the struggle for power between the EU and its Member States at the WTO level, and the necessity to find compromises ensuring the consistency and effectiveness of the EU's external action within this organization. The profound reform of the CCP following the entry into force of the Lisbon Treaty on 1 December 2009 deserves particular attention in this respect, especially considering the fact that Opinion 1/08 was rendered the day before and that, as a consequence, the conclusion of the envisaged agreements at issue will be governed by the provisions of the TFEU.[3] As a result, this Opinion offers an opportunity of

1. The authors wish to thank Dr. Peter Van Elsuwege for his valuable comments on an earlier draft. The usual disclaimer applies.

2. See for a critical comment of this provision: Pescatore, "Guest Editorial", 38 CML Rev. (2001), 266–267.

3. See further, Dimopoulos, "The effects of the Lisbon Treaty on the principles and objectives of the Common Commercial Policy", 15 EFA Rev. (2010), 153–170.

"anticipatory interpretation" by providing a glimpse of the ECJ's approach towards the reformed post-Lisbon CCP from a pre-Lisbon perspective.

This case note will first present the factual and procedural background of Opinion 1/08 before moving towards a description of the Court's reasoning and an analysis of the main lessons which can be drawn from it.

2. Facts and procedure

Before joining the EU in 1995 and 2004, the thirteen acceding Member States had their own specific list of commitments under the GATS, describing the extent to which services are to be liberalized. Following these accessions, the European Commission notified to the WTO Council for Trade in Services a series of modifications and withdrawals of commitments intended to be made to the Schedules of the "new" Member States in order to merge the latter with the existing Schedule of the Community and of its "old" Member States. However, various WTO members considered the new list of commitments offered by the Community to be less advantageous, compared to those applied by the new Member States before their accession. For example, the modifications resulted in an extension to various new Member States of certain limitations concerning market access in mode 3 ("commercial presence") for services regarded in the Member States as public utilities at a national or local level, which may be subject to public monopolies or to exclusive rights granted to private operators. Negotiations aiming at compensatory adjustments were therefore conducted with a number of third countries, resulting in the signature of various international agreements, encompassing a broad range of services. During the ratification process, however, the correct legal basis for the conclusion by the Community of these agreements gave rise to an internal dispute concerning the selection of the appropriate paragraphs and subparagraphs of former Article 133 EC.

Following the entry into force of the Nice Treaty, and as a result of Opinion 1/94,[4] the fifth and sixth paragraphs of former Article 133 EC read as follows:

> "5. Paragraphs 1 to 4 shall also apply to the negotiation and conclusion of agreements in the fields of trade in services and the commercial aspects of intellectual property, in so far as those agreements are not covered by the said paragraphs and without prejudice to paragraph 6.
> By way of derogation from paragraph 4, the Council shall act unanimously when negotiating and concluding an agreement in one of the fields referred to in the first subparagraph, where that agreement includes provisions for which unanimity is required for the adoption of internal rules or where it relates to a field in which the Community has not yet exercised the powers conferred upon it by this Treaty by adopting internal rules.
> The Council shall act unanimously with respect to the negotiation and conclusion of a horizontal agreement in so far as it also concerns the preceding subparagraph or the second subparagraph of paragraph 6.
> This paragraph shall not affect the right of the Member States to maintain and conclude agreements with third countries or international organisations in so far as such agreements comply with Community law and other relevant international agreements.
> 6. An agreement may not be concluded by the Council if it includes provisions which would go beyond the Community's internal powers, in particular by leading to harmonisation of the laws or regulations of the Member States in an area for which this Treaty rules out such harmonisation.
> In this regard, by way of derogation from the first subparagraph of paragraph 5, agreements relating to trade in cultural and audiovisual services, and social and human health services, shall fall within the shared competence of the Community and its Member States. Consequently, in addition to a Community decision taken in accordance with the relevant provisions of Article 300, the negotiation of such agreements shall require the common accord of the Member States. Agreements thus negotiated shall be concluded jointly by the Community and the Member States.
> The negotiation and conclusion of international agreements in the field of transport shall continue to be governed by the provisions of Title V and Article 300."

4. Opinion 1/94, *WTO*, [1994] ECR I-5267.

The European Commission considered that the negotiated agreements did not go beyond the Community's internal powers and, furthermore, did not lead to any harmonization of the laws of the Member States in an area for which the Treaty rules out such harmonization. As a consequence, the agreements at issue should be concluded by the Community alone and solely on the basis of Article 133(1) to (5) EC, in conjunction with Article 300(2) EC.

On the contrary, the Council and the Member States argued that Article 133(6) EC should necessarily serve as an additional legal basis, in particular because the agreements on the grant of compensation include modifications or withdrawals of the categories of services explicitly enumerated in Article 133(6)(2) EC, namely cultural and audiovisual services, educational services, and social and human health services. This additional legal basis implied mixity. Besides the uncertainties concerning Article 133 EC, a disagreement also emerged among the institutions and the Member States as to whether a specific legal basis regarding services in the area of transport had to be included.

Even though the Member States had already initiated internal ratification procedures, the Commission nevertheless requested an Opinion from the Court of Justice in order to clarify the vertical distribution of competence and the correct legal basis for the conclusion of the agreements on the grant of

compensation. In parallel, the European Commission has put forward very similar arguments in annulment proceedings against a decision of the Council establishing the Community's position in the General Council of the WTO on the accession of Vietnam to this organization.[5]

3. The Court's Opinion

3.1. *The arguments submitted by the Commission, the European Parliament and the Member States*

In its request for an Opinion, the European Commission raised two questions. The first question concerned the exclusive or shared competence of the EC to conclude with certain members of the WTO agreements on compensatory adjustments following the modification of the Schedules of Specific Commitments of the Community and its Member States under the GATS. The second question concerned the appropriate legal basis for the conclusion of these agreements. The Court had already made clear in the past that a procedure for an Opinion may concern the question of the appropriate legal basis as far as the latter has a "constitutional significance". That is in particular the case when the Treaty does not confer on the Community sufficient competence to ratify the agreement at issue in its entirety, a situation which entails examining the allocation as between the Community and the Member States of the powers to conclude the envisaged agreement, or where the legal basis for the measure concluding the agreement lays down a legislative procedure that differs from what has in fact been followed by the Community institutions.[6]

Clearly, both questions of the Commission were closely linked: if the answer to the first question was that the agreements at issue fell exclusively within the sphere of competence of the EC under the CCP, the additional legal bases suggested by the Council –namely Articles 133(6), 71 and 80(2) EC– were to be automatically eliminated.

5. Case C-13/07, *Commission* v. *Council*, removed from the Register on 10 June 2010. Similarly to the envisaged international agreements on the grant of compensation, this decision unquestionably presented a horizontal character considering that it encompassed all activities of the WTO. The disputed decision covering the categories of services identified in Art. 133(6)(2) EC, the Council added the latter as a legal basis, besides Art. 133(1) and (5) EC. Because of the shared competence implied by this complex legal basis, the Member States simultaneously agreed upon an "accord" outside the Council, with a similar content to that of the decision. Unsurprisingly, the Commission withdrew its request, considering the reasoning of the Court in Opinion 1/08. See also the Opinion of A.G. Kokott in that case, rendered on 26 March 2009.

6. Opinion 2/00, *Cartagena Protocol on Biosafety*, [2001] ECR I-9713, para 5.

Inspired by the rationale of Opinion 1/78 regarding the international agreement on natural rubber,[7] the Commission, followed by the European Parliament on that point, emphasized that the CCP is open and dynamic and therefore should not be confined to the traditional aspects of trade, without encompassing agreements designed to modify the terms and conditions under which the Community commits itself to opening its market to the services and suppliers of services of other countries which are WTO Members.

The European Commission maintained that the limits laid down by the Court in Opinion 1/94, according to which the exclusive external trade competence of the Community concerns only services supplied under mode 1 ("cross-border supply"), have been superseded by the then new Article 133(5) EC, introduced by the Treaty of Nice. In addition, it claimed that the Member States only retained a competence according to the second subparagraph of Article 133(6) EC when an international agreement meets the criteria laid down in subparagraph (1), namely when it leads to harmonization of internal rules in the Member States regarding social services, educational services, cultural and audiovisual services, and human health services. In any event, the European Commission claimed that Article 133(6) EC could not be interpreted as meaning that agreements which only have a limited effect on one of those sectors fall within the shared competence of the Community and the Member States, especially those which cover trade in services as a general category. Since the horizontal commitments contained in the agreements at issue concern trade in services generally without being specific to those sectors, they should be based on Article 133(1) to (5) EC and concluded by the Community alone.

In contrast, the Council and the Member States that had submitted observations considered that Article 133(6) EC should serve as an additional legal basis and that, accordingly, the envisaged agreements on the grant of compensation had to be concluded by the Community and the Member States together. On the one hand, a number of compensatory commitments contained in the agreements, such as the commitment to make less restrictive the permanent residency requirement for financial services supplied under mode 3 ("commercial presence"), would go beyond the Community's internal powers and therefore fall within the scope of Article 133(6)(1) EC. On the other hand, the envisaged agreements at issue seek to modify commitments relating to the services covered by Article 133(6)(2) EC, for example sectoral commitments in the field of educational services and horizontal commitments on subsidies.

Moreover, the Council and the Member States submitted that, since the envisaged agreements encompassed commitments on maritime and air transport

7. Opinion 1/78, *International agreement on natural rubber*, [1979] ECR 2871, para 49.

services, they must also be based on former Articles 71 and 80(2) EC. These additional legal bases would reinforce the thesis of mixity considering that the Community competence regarding transport is not by definition exclusive, unless the conditions for an application of the *ERTA* doctrine of exclusive implied powers are met.[8] In contrast, the European Commission and the European Parliament argued that the third subparagraph of Article 133(6) EC is only applicable to agreements which are exclusively, or at the very least predominantly, concerned with transport, the specific legal basis for transport being "absorbed" by CCP in other cases.

3.2. *The Opinion of the ECJ*

Before examining the two questions submitted by the Commission, the Court had to resolve a procedural problem: the negotiators were unable to agree on compensatory adjustments with regard to the withdrawals of commitments, both horizontal and sectoral, of the Republic of Cyprus and the Republic of Malta concerning national treatment under mode four ("presence of natural persons"). As a consequence, the Commission argued that these withdrawals and modifications should not be taken into account by the Court. Furthermore, the Commission maintained that modifications and withdrawals of commitments are decided unilaterally by a WTO Member, according to the procedure laid down in Article XXI GATS. The fact that such modifications or withdrawals are not subject to any approval by the other WTO Members would deprive them of the "conventional" character required by the ECJ to enter into a test of compatibility under Article 300(6) EC.[9]

The Court dismissed both arguments. It was the clear intention of the parties to include the lists of modifications and withdrawals in the envisaged agreements in issue. In particular, these modifications and withdrawals were not to enter into force until the compensatory adjustments have entered into force.[10] This indissociable link is a consequence of the objective pursued by the parties involved, to maintain a general level of mutually advantageous commitments not less favourable to trade than that resulting from the previous Schedules of the acceding Member States. In such circumstances, an analysis of the legal basis of the envisaged agreements and of the nature and scope of the Community competence to conclude them necessarily includes the modifications and withdrawals in question. The same holds true for the modifications and

8. See for a detailed discussion: Eeckhout, *External Relations of the EU* (OUP, 2004), p. 58 et seq.

9. Opinion 1/75, *OECD Understanding on a Local Cost Standard*, [1975] ECR 1355, at 1359 and 1360.

10. Opinion 1/08, para 99.

withdrawals of commitments concerning Cyprus and Malta. Their purpose is identical to modifications and withdrawals which already gave rise to agreements, namely the adjustment of the Schedules of commitments of the new Member States and the merging of those Schedules with the existing Schedule of commitments of the Community and its Member States. Despite the fact that they did not yet result in an agreement on compensations, they are inseparable from the other modifications and withdrawals and should therefore also be taken into consideration in answering the questions of the Commission.[11]

Turning to the substance, the Court first confirmed that the Treaty of Nice has extended the Community's competence in the field of CCP to trade in services supplied under modes 2 to 4 ("consumption abroad"; "commercial presence"; "presence of natural persons").[12] The fifth paragraph of Article 133 EC must be read in the light of Opinion 1/94. In this Opinion, the Court held that, under the Maastricht Treaty, only the trade in services supplied under mode 1 ("cross-border supply") fell within the scope of the CCP whereas other modes of supply were connected with internal market rules. As a result of the reform of the CCP following the Nice Treaty, the Community obtained competence to conclude the agreements at issue in part under Article 133(1) EC and in part under Article 133(5) EC.[13]

The Court then moved on to focus on the second subparagraph of Article 133(6) EC, instead of examining Article 133(6) EC in its entirety. The Court emphasized that it is apparent from the wording of subparagraph (2), which is applicable "by way of derogation" from the first subparagraph of Article 133 EC, that agreements which relate to trade in cultural and audiovisual services, educational services, and social and human health services cannot be concluded by the Community acting alone, such conclusion requiring the joint participation of the latter and its Member States.[14]

According to the Court, Article 133(6)(2) EC intends to create a balance between the interest of the Community in establishing a comprehensive, coherent and efficient external commercial policy, and the special interests which the Member States might wish to defend in the sensitive areas identified by that provision.[15] In these circumstances, shared competence should not be limited to international agreements which concern exclusively or predominantly trade in services in the said areas, but should be extended to "horizontal agreements" dealing with trade in services broadly. Indeed, the restrictive approach of Article 133(6)(2) EC defended by the Commission would imply that an

11. Ibid., paras. 103 and 104.
12. Ibid., para 119.
13. Ibid., para 124.
14. Ibid., para 134.
15. Ibid., para 136.

agreement falls within or outside the shared competence of the Community and its Member States depending solely on whether the contracting parties to the agreement decided to deal only with trade in such sensitive services or whether they agreed to deal at the same time with trade in some other types of services or in services as a whole.[16] Observing that the agreements under scrutiny concerned at least some of the areas referred to in Article 133(6)(2) EC,[17] the Court decided that this provision governed in part the conclusion of the agreements at issue, which as a result fell within the shared competence of the Community and its Member States.[18]

Regarding the provisions on transport, the ECJ considered that, with regard to the international trade in transport services, Article 133(6)(3) EC seeks to maintain "a fundamental parallelism between internal competence whereby Community rules are unilaterally adopted and external competence which operates through the conclusion of international agreements, each competence remaining ... anchored in the title of the Treaty specifically relating to the common transport policy".[19] The rule contained in that subparagraph would to a large extent be deprived of its effectiveness, if provisions with strictly the same object and contained in an international agreement were to fall in some cases within transport policy and in some cases within commercial policy depending solely on whether the parties to the agreement decided to deal only with trade in transport services or whether they agreed to deal at the same time with that trade and with trade in some other types of services or in services as a whole.

Against this background, and contrary to the interpretation given by the Court to Article 133(6)(2) EC, an application of the case law regarding the choice of the legal basis by reference to the criterion of the principal and the incidental purpose of a Community act was not as such excluded here.[20] The Court simply observed that the provisions of the envisaged agreements on the grant of compensation relating to trade in transport services cannot be held to constitute a necessary adjunct to ensure the effectiveness of the provisions of those agreements concerning other service sectors or to be extremely limited

16. Ibid., para 140.

17. The Court mentioned as an illustration the fact that the extension to the new Member States of the horizontal limitation relating to access under mode 3 to services regarded as public utilities at a national or local level, potentially subject to public monopolies or to exclusive rights granted to private operators, may apply in relation to health services.

18. Opinion 1/08, para 150.

19. Ibid., para 164.

20. The Court referred to Case C-268/94, *Portugal* v. *Council*, [1996] ECR I-6177, para 75, where the theory of the centre of gravity was applied. See further Lavranos, "Revisiting the 'predominant aim' concept for determining the correct legal basis", (2010) *European Law Reporter*, 59–63.

in scope. In order to reach that conclusion, the Court examined the content and purpose of the envisaged agreements on the grant of compensation. First, these agreements have a direct and immediate effect on trade in each of the types of services thus affected, including transport services. Second, a relatively high number of their provisions aim to modify horizontal and sectoral commitments made by the Community and its Member States under the GATS. For example, as regards the terms, conditions and limitations on which the Member States grant access to transport services markets, in particular regarding the air or maritime sectors, to suppliers of services from other WTO members, as well as national treatment. Accordingly, the Court concluded that the "transport" aspect of the agreements at issue remained anchored in the provisions of the Treaty on transport policy and were therefore not absorbed by the CCP. As a consequence, Articles 71 EC and 80(2) EC should also be included as a legal basis for the conclusion of the envisaged agreements subject to *ex ante* judicial review

In sum, the ECJ rejected the European Commission's arguments for an all-encompassing exclusive Community competence to conclude the horizontal agreements on the grant of compensation. More specifically, the Court concluded that these agreements could not solely be based on Article 133(1) and (5) EC.

4. Commentary

The analysis of Opinion 1/08 focuses on three main aspects, namely, (i) the acts suitable for an Opinion under former Article 300(6) EC (now 218(11) TFEU), (ii) the survival of mixity within the CCP and (iii) the significance of this Opinion after the entry into force of the Lisbon Treaty.

4.1. *Acts suitable for an Opinion under Article 300(6) EC*

With Opinion 1/08, the ECJ further clarified the scope and nature of its competence to render an Opinion on an envisaged international agreement.

While the Court accepted that the modifications and withdrawals of commitments annexed to the GATS could be implemented unilaterally by the EC and its Member States, it nonetheless identified an "indissociable link" between the modifications and withdrawals of commitments, on the one hand, and the compensations on the other hand, and considered therefore that both formed an "envisaged agreement" in the meaning of Article 300(6) EC. This confirms that purely unilateral acts cannot be the subject-mater of a procedure for an Opinion.

By the same token, this part of the Court's reasoning makes it clear that only "purely" unilateral acts escape the Court's competence to render an Opinion,[21] not acts envisaged under a contracting-out formula[22] or decisions of international organizations similar to international agreements.[23] The question remains, however, whether the Court would accept to render an Opinion on a decision to be adopted by a majority of the members of an international organization.[24] In such a case, the commitment of the Union does not exclusively depend upon its vote within the organization. As a consequence, it could be objected that the obligations arising from the future decision are too uncertain to justify an *ex ante* judicial control by the Court of Justice. Against this background, however, each procedure for an Opinion presents a level of uncertainty as to the envisaged act under examination.[25] This unavoidably results from the fact that in principle no Opinion of the Court can be obtained after "consent to be bound" of the Community (now Union) has been expressed.[26] In this context, nothing seems to prevent the Court from rendering an Opinion on an envisaged decision of an international organization, even when the existence of such a decision depends upon a favourable vote by a majority of the members of that organization.[27]

A second procedural originality of Opinion 1/08, closely linked with the first one, is the inclusion of all modifications and withdrawals of commitments for the determination of the legal basis of the envisaged agreements in issue. Contrary to the suggestion made by the Commission, even those modifications

21. For instance, a declaration of competence annexed to a mixed agreement or the denunciation or suspension of an international agreement.

22. This was for example the case in Opinion 1/75 regarding an OECD Understanding on a Local Cost Standard (cited *supra* note 9) or in Opinion 2/91 regarding the ILO Convention No.170 concerning safety in the use of chemicals at work ([1993] ECR I-1061).

23. See for example Opinion 2/92, *Third revised Decision of the OECD on national treatment*, [1995] ECR I-521.

24. The Court has already accepted to review the legality of a decision of the Council regarding the exercise of voting rights within an international organization. See Case C-25/94, *Commission* v. *Council*, [1996] ECR I-4577, para 13.

25. For example, the OECD Understanding on a Local Cost Standard, examined by the Court in its first Opinion (cited *supra* note 9), ultimately took the form of a non-binding act, not amenable to judicial review.

26. See in particular Opinion 3/94, *Framework agreement on bananas*, [1995] ECR I-4577, para 13.

27. As a consequence, an Opinion of the Court could have been requested on the vertical distribution of competences regarding the expression of a vote within the WTO on the accession of Vietnam to this organization, parallel to its request for an Opinion on the envisaged agreements on the grant of compensation. This would have avoided the annulment proceedings ultimately started by the Commission (*Commission* v. *Council*, cited *supra* note 5). The fact that the Court first rendered its Opinion, even though the annulment proceedings had been started long before the request for an Opinion, is a clear illustration of the Court's preference for an *ex ante* judicial control of EC/EU's external action.

and withdrawals whereupon no agreement on compensatory adjustments had been reached by the time the Opinion was rendered were taken into account. The reluctance of the Court to conceive its competence under Article 300(6) EC too narrowly is not surprising in the context of an *ex ante* judicial control.[28] The Court deemed it necessary to take as many elements as possible into consideration in order to provide the most accurate answer to the questions put by the Commission and, in turn, to forestall the complications that would arise from possible future judicial challenges.[29] This functional approach preserves furthermore the judicial nature of the Court's mission under Article 220 EC (now 19(1) TEU): entrusted with the task of verifying that, in implementing the Treaties, the institutions and the Member States observe the law, the Court is empowered to apply a qualitative *ex ante* judicial control, resulting in an appropriate answer to the legal problems raised in the request for an Opinion.

Third, Opinion 1/08 concerns seventeen agreements on the grant of compensations for modification and withdrawal of certain commitments under the GATS, despite the fact that only the agreement signed with Japan had been communicated to the Court. According to the rules on connexity, however, the ECJ would probably refuse to render one single Opinion on various envisaged agreements which are not closely linked to each other, even if they raise comparable doubts as to their compatibility with primary law or questions regarding the distribution of external competence. Significantly, the Court emphasized in Opinion 1/08 that the Council had endorsed the Commission's position that the draft agreements on the grant of compensation were virtually identical in substance.[30]

4.2. *The survival of mixity for horizontal agreements of the CCP*

On the substance, Opinion 1/08 confirmed that not the whole CCP fell within the exclusive competence of the EC before the entry into force of the Lisbon Treaty. Article 133(6)(2) EC aims to take into account the special interests which the Member States might wish to defend in the areas identified in that provision, namely trade in cultural and audiovisual services, educational services, and social and human health services. Consequently, the Court rejected here the application of the "centre of gravity" test for the choice of the correct

28. See already Opinion 1/78, cited *supra* note 7, paras. 33 to 35.

29. A parallel is possible here with Opinion 1/00, where the Court, in order to test the compatibility of the Agreement establishing a European Common Aviation Area with the autonomy of the Community legal order, included in its analysis other provisions of the draft agreement than those mentioned by the Commission in the request for an Opinion (Opinion 1/00, *European Common Aviation Area*, [2002] ECR I-3493, para 1).

30. Opinion 1/08, para 29.

legal basis: recourse to Article 133(6)(2) EC is justified even if the international agreements at issue only incidentally deal with some or all of the specific services enumerated in that provision.

Against this background, Opinion 1/08 did not deal with all the problems of interpretation of former Article 133(6) EC, thereby confirming that the procedure for an Opinion "is not intended to solve difficulties associated with implementation of an envisaged agreement which falls within shared Community and Member States competence".[31] For example, the Court did not elaborate on the nature (exclusive or shared and, in the latter case, parallel or concurrent) of Community competences under modes 2 to 4 of trade in services and the commercial aspects of intellectual property.[32] Considering that Article 133(6)(2) EC had to be included in the legal basis for the envisaged agreements on the grant of compensation, the EC and its Member States would have had to conclude them jointly. Be that as it may, this discussion is outdated: since the Lisbon Treaty has entered into force, trade in services and the commercial aspects of intellectual property now fall as a whole within the Union's exclusive sphere of competence.[33]

Conversely, the Court investigated whether the specific provisions on transport should be added to the legal basis of the agreements on the grant of compensation, besides the relevant paragraphs of Article 133 EC. As will be further discussed in the last part of this case note, this aspect of the Court's reasoning is much more decisive for the vertical distribution of competences to conclude the envisaged agreements under the Lisbon Treaty than the interpretation of Article 133(6)(2) EC, especially because "the provisions of the agreements at issue relating to trade in transport services cannot be held to constitute a necessary adjunct to ensure the effectiveness of the provisions of those agreements concerning other service sectors ... or to be extremely limited in scope ...".[34]

More startling is the final conclusion reached by the Court that the Community act concluding the envisaged agreements on the grant of compensations

31. Opinion 2/00, cited *supra* note 6, para 17.

32. A.G. Kokott argued in her Opinion rendered in *Commission* v. *Council* (cited *supra* note 5, paras. 53 to 84) that former Art. 133(5)(4) EC created a concurrent competence between the Community and its Member States. See also for a comparable standpoint, Herrmann, "Common Commercial Policy after Nice: Sisyphus would have done a better job", 39 CML Rev. (2002), 20–21; Krenzler and Pitschas, "Progress or stagnation?: The Common Commercial Policy after Nice", 6 EFA Rev. (2001), 307; Louis, "Le traité de Nice", (2001) JTDE, 31. See *contra*, for a defence of exclusivity, Neframi, "La politique commerciale commune selon le traité de Nice", (2001) CDE, 630–632; Krajewski, "External trade law and the Constitution Treaty: Towards a federal and more democratic Common Commercial Policy?", 42 CML Rev. (2005), 96–97.

33. See also the conclusions of A.G. Kokott, cited *supra* at note 5, paras. 56 and 63.

34. Opinion 1/08, para 166. See *infra* at 4.3.

"must be based both on Article 133(1), (5) and (6), second subparagraph, EC and on Articles 71 EC and 80(2) EC, in conjunction with Article 300(2) and (3), first subparagraph, EC". Admittedly, as the Court pointed out, it is "highly unusual" that a Treaty provision conferring external Community competence in a given field should resolve, as the third subparagraph of Article 133(6) EC does regarding transport, a potential conflict of legal bases by specifically stating that another provision of the Treaty is to be preferred to it.[35] It is equally true that the sole circumstance that the European Parliament enjoyed broader participation rights for the conclusion of an international agreement in the field of transport (consultation) than in the CCP (information on a purely interinstitutional basis) did not render both legal bases incompatible. In such cases, the act of conclusion is to be based on a multiple legal basis and the procedure which has to be followed is the one which fits best with the democratic accountability of Community's external action.[36] However, and according to settled case law, recourse to a multiple legal basis is not possible where the procedures laid down by each provision are incompatible or where the use of two legal bases is liable to undermine the rights of the Parliament.[37] Usually, a discrepancy between the voting rules in the Council creates such incompatibility and necessarily implies the choice of a single legal basis.[38] Article 133(5)(3) EC made it clear that the conclusion of horizontal agreements falling within the ambit of CCP required unanimity within the Council insofar as they also concerned the second subparagraph of Article 133(6) EC. Taking into consideration that the latter provision was applicable here, the conclusion of the envisaged agreements could only have been decided by unanimous vote within the Council. At first sight, this procedural requirement was incompatible with the qualified majority voting rule usually applicable for the conclusion of an international agreement in the field of transport.[39] It is to be regretted that Opinion 1/08 lacks any explanation in that regard, especially because this issue will probably surface again after the entry into force of the Lisbon Treaty.[40]

A possible justification could be the exceptional nature of Article 133(6)(2) and (3) EC. As stated above, the second subparagraph of Article 133(6) EC

35. Ibid., para 157.

36. Case C-94/03, *Commission* v. *Council* (*Rotterdam Convention*), [2006] ECR I-t, para 54.

37. Ibid., para 52.

38. Case C-300/89, *Commission* v. *Council* (*titanium dioxide*), [1991] ECR I-2867, paras. 17 to 21; Case C-338/01, *Commission* v. *Council*, [2004] ECR I-4829, paras. 57 and 58; for a confirmation *a contrario*, Case C-155/07, *Parliament* v. *Council*, [2008] ECR I-1, para 76.

39. In its *Rotterdam Convention* case (cited *supra* note 36, para 53) the Court explicitly confirmed that the unanimity rule foreseen in Art. 133(5)(3) EC would be incompatible with the recourse to qualified majority for the conclusion of an international agreement on environmental protection.

40. See Art. 207(4)(3) and (4) TFEU. See also *infra*, 4.3.

reflects the desire of the Member States to secure their joint participation with the Community for the conclusion of any international agreement relating – even partly – to trade in cultural and audiovisual services, educational services, and social and human health services, while its third subparagraph is intended to ensure that trade in transport services remains anchored in the title of the Treaty specifically relating to transport policy. If the Court had concluded that Article 133(5) and (6)(2) EC, on the one hand, and Articles 71 and 80(2) EC on the other hand, could not serve as a dual legal basis, the envisaged horizontal agreements should have been based on one single group of provisions. Arguably, each alternative would have been unsatisfactory: recourse to the sole provisions on transport would disregard Article 133(6)(2) EC, whereas agreements based only on Article 133 EC would ignore the specific nature of transport services under Article 133(6)(3) EC. Therefore, the cross application of both subparagraphs seems to exceptionally supersede the usual incompatibility between unanimity and qualified majority voting within the Council. Remarkably, a balance was thus found between the various interests at stake: the choice of a dual legal basis not only preserves a strong grip on trade in services by Member States, but also enhances the participatory rights of the European Parliament, thereby strengthening the possibilities for that assembly and the Member States to control the Commission's activities within the CCP.

4.3. *The Opinion and its significance after the entry into force of the Lisbon Treaty*

It is striking that Opinion 1/08 was delivered by the Grand Chamber the day before the entry into force of the Lisbon Treaty, which drastically reforms the CCP. In short, the Lisbon Treaty expands the exclusive external competence of the Union to all services – with the exception of transport services – trade-related aspects of intellectual property rights and foreign direct investments.[41] One may wonder why the Court did not wait until 1 December 2009 to render its Opinion, considering that the decisions of the Council to conclude the various international agreements at issue will be unavoidably governed – at least partially – by Article 207 TFEU and that this new legal framework has a decisive impact on the questions raised by the Commission.

This is not to say, however, that Opinion 1/08 has lost all its significance in the post-Lisbon era. The Lisbon Treaty maintains trade in transport services as a distinct sector, governed by specific provisions, in which the Union and its Member States continue to share, in principle, the external competence.[42] As a result, the Union remains deprived of a "uniform and comprehensive external trade competence".[43] Significantly, the Court has concluded in its Opinion 1/08 that the transport aspects of the envisaged agreements on the grant of compensation should remain anchored in the specific provisions of the Treaty on transport policy.[44] Furthermore, Opinion 1/08 implies that a multiple legal basis is necessary here, even in a case where the various provisions at stake foresee a different voting rule within the Council. Whereas in principle the qualified majority voting rule is applicable for the conclusion of an international agreement in the field of transport, Article 207(4)(3) TFEU nevertheless provides that the Council shall act unanimously for the negotiation and conclusion of agreements: (a) in the field of trade in cultural and audiovisual services, where these agreements risk prejudicing the Union's cultural diversity and linguistic diversity; and (b) in the field of trade in social, education and health services, where these agreements risk seriously disturbing the national organization of such services and prejudicing the responsibility of Member States to deliver them.[45] According to Opinion 1/08, such a difference in the voting rules within the Council does not form an obstacle to a multiple legal basis in this particular case. Indeed, Article 207(5) TFEU, which corresponds in substance to former Article 133(6)(3) EC, maintains trade in transport services outside the general scope of CCP and the exceptional nature of this provision seems to be the only way to understand why the Court departed from its traditional case law on procedural compatibility in the commented Opinion. For these reasons, it can be expected that the decisions concluding the agreements on the grant of compensation will be based on Articles 207, 91 and 100(2) TFEU. The rather surprising consequence of this multiple legal basis is that the Member States will most probably have to ratify these agreements as well as the Union.[46]

In any case, unanimity reintroduces through the backdoor an opportunity for each Member State to block the conclusion of any international agreement covering – even incidentally – trade in cultural and audiovisual services, and trade in social, education and health services, thereby rendering any further liberalization of the latter highly hypothetical.[47] Be it as it may, however, this

41. Art. 207(1) TFEU.

42. Art. 207(5) TFEU and Art. 4(2)(g) TFEU. This shared competence is nonetheless without prejudice to the exclusivity that may result from the "affectation" doctrine codified in Art. 3(2) TFEU.

43. See the Opinion of A.G. Kokott in *Commission* v. *Council* (cited *supra* note 5, para 136).

44. Opinion 1/08, para 166.

45. These new cases of unanimity are so vaguely defined that they will probably give rise to conflicts of interpretation and legal proceedings before the ECJ. See already Krajewski, op. cit. *supra* note 32, 121–122.

46. See for an early defence of this solution, that would preserve consistency between CCP and the internal order of competences within the Union, Müller-Graff, "The Common Commercial Policy enhanced by the Reform Treaty of Lisbon?" in Dashwood and Maresceau (Eds.), *Law and Practice of EU External Relations. Salient Features of a Changing Landscape* (Cambridge University Press, 2008), p. 192.

47. Barents, *Het verdrag van Lissabon. Achtergronden en commentaar* (Kluwer, Deventer, 2008), p. 659.

voting rule is very different from a ratification by both the EU and its Member States, at least from a legal point of view. Moreover, the new provisions make the application of unanimity conditional upon a specific analysis of the practical impact of the norms at stake for the Member States, whereas under Nice, the entire field of trade in cultural and audiovisual services as well as trade in social, education and health services fell under the shared competence of the EU and its Member States. In this respect, it should be emphasized that the condition that unanimity in the Council in the field of trade in social, education and health services should be limited to cases where there is a risk of serious disturbance of the national organization of such services or of prejudicing the responsibility of Member States to deliver them is inspired by the case law of the ECJ regarding national restrictions on the free movement of patients across the EU.[48] In other terms, these exceptions seem to contribute to the consistency between the balance of powers within the internal market and the common commercial policy.

These various observations tend to confirm again the metaphoric description of the successive reforms of the CCP as an Echternach Procession, where participants used to dance three steps forwards, two steps backwards.[49] The combination between the shared nature of competences regarding trade in transport services and the maintenance of a possible unanimity requirement for trade in cultural and audiovisual services and in social, education and health services in fact mitigates the broadening of the exclusive external competence intended by the Lisbon Treaty. In this sense, Opinion 1/08 is a clear message to the European Commission that not every international agreement that falls within the scope of the CCP is automatically and fully an exclusive competence of the EU, even if the Member States and the EU institutions have a duty to collaborate with each other in the conduct of their external relations.[50] The Opinion is particularly illustrative of the Court's awareness of the concerns of the Member States regarding trade in cultural and audiovisual services, educational services, and social and human health services, and, to some extent, underlines the strengthened role of the European Parliament in the CCP after the entry into force of the Lisbon Treaty. In fact, the European Parliament has already started to flex its muscles in the context of the recently negotiated Free

48. See e.g. Case C-158/96, *Kohll* v. *Union des caisses de maladie* [1998] ECR I-1931, para. 31; Case C-157/99, *Smits and Peerbooms* [2001] ECR I-5473, paras 72–75; Case C-385/99, *Müller-Fauré* [2003] ECR I-4509, para 92; Case C-444/05, *Stamatelaki* [2007] ECR I-3185, para 38.

49. Bourgeois, "The EC in the WTO and Advisory Opinion 1/94: An Echternach Procession", 32 CML Rev. (1995), 763–787.

50. Opinion 1/08, para 136. See on this aspect Neframi, "The Duty of Loyalty: Rethinking its Scope through its Application in the Field of EU External Relations", 47 CML Rev. (2010), 323–359, esp. 357–359.

Trade Agreements (FTAs) with South Korea[51] and Peru and Colombia,[52] thereby making clear that, from now on, it is ready to make use of the power it recently gained to veto the conclusion of any trade agreement. As a consequence, in future negotiations, the European Commission will not only have to cope with the pressure of the Member States to accept mixity or at least unanimity voting within the Council, but also to take fully account of the concerns of the European Parliament, especially regarding the human rights records of EU's trade partners. Presumably, this could make the CCP internally more difficult to organize and, in turn, weaken the EU's external negotiation position *vis-à-vis* third countries and representation within international organizations. Hence, it is safe to assume that new disputes concerning the correct legal basis, the distribution of competences and the decision-making procedure that must be followed for the negotiation and conclusion of trade agreements will be brought before the ECJ in the (near) future.

Stanislas Adam* and Nikolaos Lavranos**

51. See: EUobserver, "Korean trade deal could fall under Lisbon rules", 14 Jan. 2010, available at: euobserver.com/?aid=29268.

52. See: EUobsever, "Parliament sets out concerns over Colombia trade deal", 2 Feb. 2010, available at: euobserver.com/?aid=29392, and EUobserver, "EU completes trade talks with Peru and Colombia", 2 March 2010, available at: euobserver.com/?aid=29582.

* Dr. iur., Ghent University (European Institute); LL.M. candidate (Harvard Law School).

** Dr. iur., LL.M., former Max Weber Fellow (2008–2009) European University Institute (EUI) Florence.